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October 19, 2011

To: Members of the Senate Committee on Judiciary, Utilities, Commerce, and Government Operations
From: Sen. Glenn Grothman
Re: Senate Bill 202

Senate Bill 202 seeks to repeal several provisions enacted into law by the preceding Legislature and Governor, which claimed to create protections from discrimination and unfair honesty and genetic testing. Instead, 2009 Act 20 created new bureaucratic and legal hassles for small business, while increasing workloads on Wisconsin's state government and court system.

2009 Act 20 created a lengthy, complex, and unnecessary new set of procedures that put Wisconsin businesses at greater risk for frivolous lawsuits:

- Federal anti-discrimination laws already allow federal courts to impose punitive damages;
- State law already provided for and will continue to provide for reinstatement, payment of back pay and payment of costs and attorney fees;
- The procedures established by 2009 Act 20 create a whole new round of litigation, making the process even longer and more expensive;
- 2009 Act 20 also created a new layer of bureaucratic oversight, allowing DWD to file charges even when a potential plaintiff does not;
- The effect is to add to the workloads of both the state government and local courts, while opening Wisconsin businesses up to greater potential liability and greater exposure to frivolous lawsuits;
- Small businesses are the most vulnerable when faced with potentially high court costs.

2009 Act 20 was opposed by the very businesses and employers Wisconsin is counting on to help turn our economy around. These repeals are supported by the same businesses and employers.

Senate Bill 202 will have no effect on an employee's ability to be compensated and reinstated following a discrimination or similar complaint. It will reduce the risk for employers; give employers more confidence in their ability to hire and produce; and increase Wisconsin's reputation for business-friendliness around the nation and the world.

Thank you.

WISCONSIN STATE ASSEMBLY
Christine Sinicki
STATE REPRESENTATIVE

October 19th, 2011

Comments regarding 2011 Senate Bill 202, Repeal of the Equal Pay Enforcement Act, before the Senate Judiciary Committee

Thank you Mr. Chairman and members of the Committee. I'm here to comment on Senate Bill 202, which repeals 2009 Act 20, authored by Senator Hansen and myself last session. Act 20 created an important deterrent against workplace discrimination to our state's Fair Employment Law. That deterrent is the potential remedy of damages for workers who prove to DWD that their employer discriminated against them. The amounts of those damages are capped according to business size, and are same as the amounts that have always been available under the federal Civil Rights law. Those federal amounts, by the way, were set at least two decades ago.

Our intent in passing Act 20 was to deter employers from discriminating. If you look at the internet ads for seminars on how to avoid these sanctions, it is evident that with proper education about the Wisconsin Fair Employment Law, that is possible. It takes a very long time for any of these discrimination claims to move through DWD's administrative law process. DWD estimated that Act 20 would possibly create up to ten cases a year going to circuit court for damages. So the real world impact of this law is minimal. Yet it drives the authors of SB 202 mad with irritation. If fact, the Senate author told me that Act 20 would ruin the state!!!!!

Among points raised in earlier testimony today is that federal courts already take discrimination cases under the US civil rights law, and that due process is available there. What we know is that exactly the opposite is available. The reason federal court is preferred by attorneys for the employers is that summary judgment dismissals are more readily available in federal court. This means that lawyers ask that the case be dismissed <u>without</u> any hearing, so that there <u>is no</u> due process! In state court, a case must be <u>very obviously</u> without merit, and so these cases would not qualify for summary judgment – we wrote the law to insure that only cases decided by DWD to have merit would be eligible for damages.

As you can also tell from prior testimony, some trail attorneys intensely opposed Act 20 because it didn't go far enough. They dislike the caps on the damages, as well as the law's insistence on exhaustion of the administrative law process at DWD before a case can go to court.

But Senator Hansen and I didn't write Act 20 for lawyers. In fact, it's my impression from testimony here today that attorneys for employers are busier as a result of Act 20 than attorneys for workers. Funny how that worked out.

Regardless of who now has a job thanks to Act 20, we wrote this law for workers, not for any attorney. But workers and their jobs, ironically, seem to be the last thing the authors of SB 202 have in mind.

Thank you, Mr. Chairman.

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WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System

Repeal Punitive and Compensatory Damages under the Wisconsin Fair Employment Act

Last session, Gov. Jim Doyle signed into law 2009 Wisconsin Act 20, which allows circuit courts to award punitive and compensatory damages in cases of employment discrimination, unfair genetic testing, or unfair honesty testing. This legislation would repeal the punitive and compensatory damages.

Background of the Wisconsin Fair Employment Act

The current Wisconsin Fair Employment Act (WFEA) prohibits, for example, employment discrimination based on age, ancestry, arrest record, conviction record, creed, color, disability, marital status, military service, national origin, race, sex, or use or nonuse of legal products during nonwork hours off the employer's premises.

If the Department of Workforce Development (DWD) finds that an employer has refused to hire an individual, terminated an individual's employment, or discriminated against an individual in promotion, in compensation, or in terms, conditions, or privileges of employment based on any of the above criteria, DWD may order any of the following remedies:

- Reinstate the employee;
- Provide back pay for not more than two years before the filing of the complaint;
- Require the employer to pay the employee's costs and attorney fees.

Under 2009 Act 20, the employee may then commence a separate civil action in State Court against the employer (if the employer has 15 or more employees) seeking an additional award of:

- Punitive and compensatory damages; and
- The employee's additional costs and attorney fees in the civil action.

Total compensatory damages (future economic losses, loss of enjoyment of life, emotional distress, pain and suffering, mental anguish, and other noneconomic damages) and punitive damages are determined by the size of the employer's business and up to the following amounts:

- $50,000 for employers that have 15 to 100 employees;
- $100,000 for employers with 101 to 200 employees;
- $200,000 for employers with 201 to 500 employees; and
- $300,000 for employers with more than 500 employees.

Punitive and compensatory damages are indexed to the consumer price index and will increase in future years.

2009 Wisconsin Act 20's Punitive and Compensatory Damages Should Be Repealed

- During the prolonged economic downturn, the last thing Wisconsin can afford is to saddle businesses with extra, and unnecessary, litigation costs.

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- Prior to enactment of 2009 Act 20, Wisconsin employers have already been forced to defend WFEA claims before the DWD, and against simultaneously cross-filed claims under federal laws based on the same facts and alleged types of claims before federal agencies, and then in state or federal court under federal law.
- After enactment of 2009 Act 20, Wisconsin employers are now forced to not only defend WFEA claims in the administrative hearing process before the DWD, but also then re-litigate the same case in State Court in a full jury trial (or in a new trial to the court) in defense of potential punitive and compensatory damages, and additional costs and attorney fees.
- At the same time, Wisconsin employers continue to be forced to defend simultaneously cross-filed claims under federal laws based on the same facts and alleged types of claims before federal agencies, and then in state or federal court under federal law.
- 2009 Act 20 is duplicative, unnecessary and unduly burdensome on Wisconsin employers as federal employment laws already provide the same potential punitive and compensatory damages as under 2009 Act 20.
- The same potential punitive and compensatory damages are already available under, for example:
    - The federal Title VII of the Civil Rights Act of 1964 (employers with 15 or more employees);
    - The federal Americans with Disabilities Act of 1990 (employers with 15 or more employees);
    - The federal Genetic Information Nondiscrimination Act of 2008 (employers with 15 or more employees);
    - The federal Employee Polygraph Protection Act of 1988 (employers with one or more employees).

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To: Senator Zipperer, Chair, Senator Kedzie, Co-chair and members of the Senate Committee on Judiciary, Utilities, Coommerce and Government Operations

From: Jodi Hanna, Supervising Attorney, Disability Rights Wisconsin

Subject: DRW opposes SB 202

Date: October 19, 2011 Room 411 South

Disability Rights Wisconsin opposes Special Session SB 12, which will eliminate workers' rights to seek pain and suffering and punitive damages for employment discrimination or unfair honesty or genetic testing. Eliminating the right to these damages harms workers with disabilities.

Disability Rights Wisconsin is Wisconsin's designated protection and advocacy agency for people with disabilities. We serve people with all types of disabilities and ages throughout Wisconsin. Of relevance to this issue, I serve as an attorney on DRW's civil rights team, providing advice and representation to workers with disabilities experiencing employment discrimination. DRW provides technical assistance, advice or representation to hundreds of workers with disabilities with employment discrimination claims.

One of the most vulnerable groups affected by elimination of the right to damages is people with disabilities who face employment harassment. I currently represent a young man with cognitive disabilities who worked as a janitor at a restaurant/bar. The other employees called him names and stole his property. They arranged elaborate hoaxes, such as telling him that a police officer in the bar had found illegal drugs in his belongings and that he would be arrested. His male co-workers convinced him that a female co-worker was in love with him. However, she was part of the hoax. My client bought her an engagement ring and tried to propose to her. They enjoyed seeing him angry, upset, worried and crying. They were so proud of themselves that they video recorded their exploits and uploaded them on line. The young man's family discovered the videos. They also discovered that the employer was one of his tormentors. **It would be a grave injustice if this young man, who was a victim of vicious harassment, could not seek damages for the pain and suffering the harassment caused him.**

Second, under current law, these remedies are only available to an employee who has successfully completed the administrative process. In other words, the employee first must complete all administrative proceedings before the DWD Equal Rights Division and the Labor and Industry Review Commission. Only then may the employee file in circuit court to seek pain and suffering and punitive damages. Because the process is long and difficult, it is only used in limited situations. Even though the provision to seek damages is not frequently used, it is a vital remedy that helps eliminate illegal employment discrimination, particularly in harassment cases.

Finally, the current remedies available to employees under the WFEA parallel federal employment laws, such as Title I of the Americans with Disabilities Act. This makes it easier for employees to understand their rights and compliance easier for employers.

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CHRIS TAYLOR
STATE REPRESENTATIVE ◆ 48th ASSEMBLY DISTRICT

October 19, 2011

Senator Zipperer
Chair, Senate Committee on Judiciary, Utilites, Commerce and Government Operations
State Capitol, Room 323 South
Madison, WI 53707

Dear Chairman Zipperer and committee members,

Thank you for the opportunity to submit written testimony on Senate Bill 202. Please accept this as my testimony in opposition to Senate Bill 202.

Senate Bill 202 eliminates the awarding of compensatory and punitive damages to persons who have been discriminated against in employment or subjected to unfair honesty or genetic testing.

This bill is yet another example of the state seeking to take away a legal right from our citizens and making it harder for citizens to access our state court system. I urge the committee to not hold an executive session on the proposal.

Just last session the legislature passed ACT 20 which allowed women, minorities and other protected classes to seek compensatory and punitive damages at the state level if they are successful and win their employment discrimination case. If Senate Bill 202 is passed a person who suffered discriminated will have to go to the federal courts to seek compensatory and punitive damages. These damages serve as an important deterrent against discrimination and should be available regardless of the court venue of a case.

Proponents of this bill argue that a person's ability to seek punitive and compensatory damages in both state and federal court is duplicative. It is not. The federal government's employment laws do not recognize sexual orientation as a protected class. If Senate Bill 202 becomes law, discrimination claims based upon sexual orientation will have no monetary remedies beyond wage loss.

Another class of people who will have no redress if Senate Bill 202 becomes law are people who are discriminated against because of their conviction or arrest records. There exits no federal employment protection for those who have been convicted of a crime.

The current law allowing compensatory and punitive damages in state court serves as an important deterrent to egregious behavior and allows a broader class of plaintiffs who have suffered employment discrimination to seek the redress they deserve.

I urge the committee to reject Senate Bill 202. Thank you

Chris Taylor
State Representative
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Memorandum

TO: **Members of the Senate Committee on Judiciary, Utilities, Commerce and Government Operations**

FROM: **Bill G. Smith, State Director**

DATE: **October 19, 2011**

RE: **Senate Bill 202**

Regretfully, I am unable to attend the public hearing on Wednesday, October 19 for Senate Bill 202.

Senate Bill 202 is an important proposal strongly supported by our state's small business community.

During the 2009-10 Session, legislation was enacted that allows for the recovery of compensatory and punitive damages for violation of the Wisconsin Fair Employment Act. These damages may be awarded in addition to unlimited back pay, attorney fees, and other expense amounts incurred during the proceedings.

The *fear* of becoming involved in a lawsuit causes over 20 percent of small business owners to spent more time on liability issues and potential liability problems than such vital business activities as introducing new technologies, evaluating changes in employee wages and benefits, obtaining or repaying business loans, evaluating the competition, or looking for ways to cut costs.

These are the job creating and job sustaining activities small employers should be engaged in – and not needlessly and unproductively spending money on liability insurance and legal fees.

Senate Bill 202 will remove the unnecessary and unreasonably harsh penalties found in the Fair Employment Act, and I respectfully urge members of the committee to support passage.

Thank you for your consideration.

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